FEDERAL COURT OF AUSTRALIA

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Mukiza [2022] FCAFC 105

Appeal from:	*Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1503
File number(s):	NSD 30 of 2022
Judgment of:	**MARKOVIC, THAWLEY AND CHEESEMAN JJ**
Catchwords:	**COSTS –** where the first respondent contends the costs order made by the primary judge in his favour should not be disturbed and the appellant should not be granted his costs of the appeal – application dismissed.
Date of judgment:	21 June 2022
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 37N(4), 43 *Migration Act 1958* (Cth) s 501CA
Cases cited:	*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Mukiza* [2022] FCAFC 89 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; (2021) 395 ALR 403 *Summers v Repatriation Commission* (No 2) [2015] FCAFC 64 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 144; (2020) 278 FCR 386
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	11
Date of hearing:	Determined on the papers
Counsel for the Appellant:	Ms R Francois
Solicitor for the Appellant	Clayton Utz

Counsel for the First Respondent:	Dr J Donnelly
Solicitor for the First Respondent:	Zarifi Lawyers
Counsel for the Second Respondent:	The second respondent filed a submitting notice save as to costs.

ORDERS

NSD 30 of 2022

BETWEEN:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** Appellant
AND:	**THIERRY MUKIZA** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**MARKOVIC, THAWLEY AND CHEESEMAN JJ**
DATE OF ORDER:	**21 JUNE 2022**

THE COURT ORDERS THAT:

1. In proceeding NSD 577 of 2021 Order 3 be set aside and in lieu thereof order that:

   (a) the applicant pay the first respondent's costs, as agreed or taxed.

2. The first respondent pay the appellant's costs of the appeal, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 On 18 May 2022 we made orders allowing the appeal by the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs, setting aside the orders of the primary judge, in lieu thereof ordering that the application for judicial review be dismissed and reserving the question of the costs of the proceeding before the primary judge and the appeal, with the parties to provide their submissions on those questions so that they could be determined on the papers: see *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Mukiza*** [2022] FCAFC 89.

2 The parties have now provided their submissions.

3 Mr Mukiza submitted that regardless of the outcome of the appeal, the costs order made by the primary judge in his favour should not be disturbed and the Minister should not be granted his costs of the appeal. He sought that outcome for the following reasons:

(1) because the Minister's approach had "markedly evolved" on appeal. He had made submissions not made before the primary judge;

(2) his conduct throughout the entire litigation has been reasonable and rational and, given that the decision in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Viane*** [2021] HCA 41; (2021) 395 ALR 403 was published about one week after the primary judge handed down her decision, he could not be criticised for not understanding future developments in the law;

(3) the appeal contained a significant public interest element, namely the extension of the principles in *Viane* to decision making by the Administrative Appeals Tribunal; and

(4) the High Court of Australia in *Viane* ordered the Minister to pay the first respondent's costs in that appeal because the case involved an important point of principle and in the appeal the Minister sought to extend the point of principle.

4 The Court's power to make an award of costs is discretionary: see s 43 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). The power must be exercised judicially, not arbitrarily or capriciously or on grounds unconnected with the litigation, having regard to relevant principle and the justice of the case in all the circumstances: ***Summers*** *v Repatriation Commission* (No 2) [2015] FCAFC 64 at [14] (Kenny, Murphy and Beach JJ). Section 37N(4)

requires the Court to take into account any failure to comply with the duties in s 37N(1) or (2) of the FCA Act, being duties derived from the requirement to act consistently with the overarching purpose described in s 37M(1). Section 43(3)(e) of the FCA Act provides that an award of costs may be made in favour of, or against, a party whether or not that party is successful in the proceeding. A weighty factor in favour of awarding costs to a party is the degree to which the party was successful. This is why, absent some reason justifying some other order, a costs order is ordinarily made in favour of the successful party.

5 None of Mr Mukiza's arguments persuade us, in the circumstances of the present appeal, to exercise our discretion in the way he urges.

6 First, it is not correct to say that the Minister's position evolved. Before the primary judge the Minister made the formal submission that the decision of a Full Court of this Court in *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 144; (2020) 278 FCR 386 (***Viane Full Court***) was wrongly decided. That was the only submission that the Minister could make in circumstances where the primary judge was bound by *Viane Full Court*. In the appeal the Minister relied on *Viane* to make good his grounds of appeal.

7 Secondly, that Mr Mukiza acted rationally and reasonably is not a reason to proceed in the way he urges. Many litigants would claim to act in that way but may still be unsuccessful in their litigation. That alone cannot entitle an unsuccessful litigant not to be subject to a costs order, less still to an order for costs in their favour. Putting that to one side, it is somewhat disingenuous for Mr Mukiza to claim, in the circumstances of this case, that he could not be criticised for not understanding future developments in the law. At the time of the hearing before the primary judge, trial counsel for Mr Mukiza had only recently appeared for the first respondent before the High Court in *Viane* and, while the High Court was reserved, relied on *Viane Full Court* in support of Mr Mukiza's application before her Honour.

8 Thirdly, there was no public interest element, in the sense contended for by Mr Mukiza, in the appeal. There was no relevant extension of principle in the appeal. The proper construction of

s 501CA(4) of the *Migration Act 1958* (Cth) does not change depending on who makes the particular decision: see *Mukiza* at [48]-[49].

9 Fourthly, the approach taken by the High Court to costs in *Viane* was a matter for that Court. There was no attempt by the Minister to extend the principles in the appeal. But even if there was, that would not necessarily lead to the outcome sought by Mr Mukiza.

10 Having considered the submissions made by the parties we can see no reason why, in the exercise of our discretion, costs should not follow the event. The Minister having succeeded on appeal should have the benefit of his costs before the primary judge and his costs of the appeal.

11 We will make orders accordingly.

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Markovic, Thawley and Cheeseman.

Associate:

Dated: 21 June 2022